No. 10625

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ROSE PAPANTONIO, suing in her own behalf as a shareholder of TRANSAMERICA CORPORATION and in behalf of all other shareholders of said corporation similarly situated,

Appellant,

vs.

AMADEO P. GIANNINI, *et al.*,

Appellees.

Supplemental Brief of Appellee Bank of America National Trust and Savings Association, as Administrator C. T. A. of the Estate of John M. Grant, Deceased.

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TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

CASES.

STATUTES.

TEXTBOOKS.

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Introductory.

This brief is supplementary to the general brief filed herein on behalf of all of the appellees. Its purpose is to present a single point particularly applicable to the appellee Bank of America N. T. & S. A. as administrator c. t. a. of the estate of the deceased director, John M. Grant, and not presented in the general brief.

THE ARGUMENT.

Failure of the Complaint to Show That a Claim Was Filed With Bank of America, as Administrator of the Estate of John M. Grant, Deceased, Required Dismissal of the Action.

It is alleged in the second amended complaint that John M. Grant was a director of Transamerica from February 15, 1932, to March 15, 1941 [Tr. p. 158], that he died on or about March 25, 1941, and that the defendant Bank of America National Trust and Savings Association was duly appointed and qualified as administrator c. t. a. of his estate. [Tr. p. 148.] The action was commenced April 16, 1941. [Tr. p. 484.] It is not alleged that any claim was filed or presented to the appellee bank as administrator. This deficiency was assigned as one of the particular grounds upon which the appellee bank moved to dismiss the complaint for failure to state a claim upon which relief could be granted. [Tr. p. 238.]

A. No Suit May Be Maintained Without Prior Presentation of a Claim to the Administrator.

> "All claims arising upon contract, whether they are due, not due or contingent, and all claims for funeral expenses must be filed or presented within the time limited in the notice [to creditors], or as extended by the provisions of Section 702 of this Code, and any claim not so filed is barred forever unless it is made to appear by the affidavit of the claimant to the satisfaction of the Court that the claimant had not received notice by reason of being out of the state, in which event it may be filed or presented at any time before a decree of distribution is entered."
>
> *Calif. Probate Code,* Sec. 707.

"If an action is pending against the decedent at the time of his death, the plaintiff must in like manner file his claim with the clerk or present it to the executor or administrator * * *, and no recovery shall be had in the action unless proof is made of such filing or presentation."

Calif. Probate Code, Sec. 709.

"No holder of a claim against the estate shall maintain an action thereon unless the claim is first filed with the clerk or presented to the executor or administrator"

except that the holder of a lien may enforce it where recourse to other property of the estate is expressly waived in the complaint.

Calif. Probate Code, Sec. 716.

In the absence of an allegation that a claim has been filed or presented, the complaint states no cause of action.

Roach v. Hostetter, 48 Cal. App. (2d) 375, 119 Pac. (2d) 749.

That was an action to recover on covenants of a deed. The Court said:

"The complaint contains no allegations of any claim ever having been filed against the estate of decedent. An allegation of the filing of a complaint and the rejection thereof is necessary in an action against an estate. Prob. Code, §716.

"Any claim arising upon contract, whether due, not due, or contingent, must be filed as required by the Probate Code or the same is barred forever.

Prob. Code, §707; Estate of Grant, 2 Cal. (2d) 661, 43 P. (2d) 266; *Id.*, Cal. App., 34 P. (2d) 495; Morrison v. Havens, 24 Cal. App. (2d) 504, 75 P. (2d) 515.

"Therefore, we do not think the complaint states any cause of action for any of the alleged unperformed covenants of the decedent."

B. The Claim Set Forth in the Second Amended Complaint Is One "Arising Upon Contract."

As to John M. Grant, it is not alleged that he received any of the money of Transamerica or its subsidiaries. Every wrongful act he is alleged to have committed is such an act as only a director could commit. Every nonfeasance alleged is a mere failure to perform official duty as a director. In fact, it is alleged [Tr. p. 150 *et seq.*] that the defendants conspired to use their positions as directors of Transamerica to consummate the "corporate transactions and acts" complained of. [Tr. p. 153 *et seq.*] Therefore, notwithstanding that the complaint alleges the acts and omissions of the deceased director, John M. Grant, were fraudulent and done in conspiracy with others, the action and the claim set forth in the complaint arise upon contract within the meaning of California Probate Code, Section 707.

Morse v. Steele, 149 Cal. 303, 86 Pac. 693;

DeLeonis v. Etchepare, 120 Cal. 407, 52 Pac. 718;

Allsopp v. Joshua Hendy Machine Works, 5 Cal. App. 228, 90 Pac. 39;

Garcelon v. Commercial Travelers Ass'n, 184 Mass. 8, 67 N. E. 868.

In *Morse v. Steele* it was alleged that under an agreement with plaintiff the deceased received possession of certain animals and agreed to take care of them and on certain conditions return them to the plaintiff, but that the deceased neglected to care for the animals, whereby they were lost and never returned to plaintiff. The Supreme Court said:

> "To meet this, appellant contends that the cause of action set forth in the complaint is not for breach of contract, but is for tort pure and simple, and that the presentation of a claim is therefore not necessary. This position is untenable. The complaint sets up the contract, alleges performance upon the part of plaintiff, and avers that Steele in his lifetime, and afterwards defendant as executrix, failed and neglected to take care of the animals, and that by reason of such failure and neglect they were lost or destroyed, and that they had never been returned to him, to his damage in the sum of eight thousand dollars. Though not expressed, it was the implied duty of Steele in his lifetime, and of the executrix, to have returned the stock at the expiration of the bailment, and this duty itself arose under the contract, as explicitly as though it had been expressly provided for. The complaint avers that 'immediately after said contract was executed and in pursuance thereof' plaintiff delivered the livestock to Steele, and the case is, in all its essentials, like that of *Chapman v. State of California,* 104 Cal. 690 [38 Pac. 457, 43 Am. St. Rep. 158], where the harbor commissioners of San Francisco had received upon the wharves of the city coal of the plaintiff. While the coal was upon the wharf it broke, 'by reason of the negligence and carelessness of the defendant, its officers and agent, . . . in failing and

neglecting to keep said wharf in good and sound condition and repair,' and the coal was sunk in the bay and lost to plaintiff. The action was against the state. If it was in tort, plaintiff was not entitled to recover. This court, after so stating, declared: 'But we are clearly of the opinion that the cause of action alleged in the complaint is not of this character. It is not founded upon negligence constituting a tort, pure and simple, and unrelated to any contract, but is substantially an action for damages on account of the alleged breach of a contract . . . We are entirely satisfied that the plaintiff's cause of action, as alleged in the complaint, arises upon contract.' In *Stark v. Wellman,* 96 Cal. 400 [31 Pac. 259], the first count of the complaint averred that plaintiff delivered to defendant, at his special instance and request, a package containing six hundred and fifty dollars in coin, in consideration of which defendant undertook and agreed to take due and proper care of it, and to deliver the same to plaintiff upon demand. It charged that defendant did not take due and proper care of said package, but so carelessly conducted himself with respect thereto that it was lost through his gross carelessness, and that he failed to redeliver it upon demand. The second cause of action was for conversion of the same package. A demurrer was interposed to the complaint upon the ground that a cause of action arising upon a contract was improperly joined therein with a cause of action for tort. The plaintiff contended that the first count was for a breach of duty imposed by law, and therefore was in tort. This court said: 'This contention cannot be sustained. It is true the owner of property injured by the tortious act of another may sue for the injury in tort, without noticing a

> contract with the wrongdoer of which the wrongful act is a violation . . . But there can be no question that he may sue for the breach of a contract, as was done in this case. The duty which the defendant is charged with having violated is expressly derived from the contract.' "

In *DeLeonis v. Etchepare, supra,* the action was by a principal against his agent to recover money alleged to have been received by the agent and not accounted for. It was held to be an action upon an implied contract within California Code of Civil Procedure, Section 537, allowing attachments in actions upon contracts.

In *Allsopp v. Joshua Hendy Machine Works, supra,* the plaintiff had intrusted property to the defendant as agent for resale and it was alleged that the agent had appropriated some of the property to his own use. There was a prayer for an accounting. It was held that notwithstanding the allegations of conversion of the property, the action was in contract and not in tort.

In *Garcelon v. Commercial Travelers Association,* it was held that a complaint against a fraternal association for rejecting the plaintiff's claim and refusing to make an assessment for payment thereof was upon contract, although the complaint alleged bad faith and a fraudulent purpose.

Mere violation of a contract *where there is no general duty* is not the subject of an action for tort.

> *Schick v. Fleischauser,* 49 N. Y. Supp. 962, 1 C. J. 1016 (Actions, Sec. 139).

Conclusion.

With respect to the appellee bank as administrator of the estate of John M. Grant, we respectfully submit that the judgment of dismissal was proper not only for all of the reasons argued in the general brief of appellees but for the additional reason that no claim was presented against the estate of John M. Grant, deceased.

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